

December 23, 1946

Dear Hugo:

I again went over the ground in the Chenery case, as I told you I would. With every impulse to sustain the Commission, I simply cannot do it after having read its Report for the third time. I cannot escape the conviction that the Commission has decided this case ad hoc without any reference to considerations that would govern it in the same case tomorrow. After laying down general considerations which would, as a general rule, justify the action which they took in the Chenery case, the Commission, in a very calculated way, does not decide this case on those general considerations, but merely decides this case as a case unrelated to those general considerations. Nothing would have been easier than for them to say, after the discussion of general considerations of potential conflict of interest, some such thing as “In the light of these considerations, etc.” In the most glaring way they abstained from making any such remark.

I do not believe that anyone is more conscious than I am of the fact that cases are not fungible goods and that the circumstances of one case vary from the circumstances of another. But when such discriminations are made by courts, they are made with reference to some general rule. It is one thing to be deviating or detouring from a general rule under appropriate circumstances – that is the nature of law. It is quite another thing to be deciding a case at large without any reference to any general considerations. For reasons which baffle me that is exactly what the Commission has done in the Chenery litigation. And, in view of the duty that Congress has imposed on us as a reviewing Court, I cannot approve of such a performance. The SEC is

not a Kedi sitting under a tree, dispensing judgment in each case, unrelated to general considerations.

Faithfully yours,

F.F.

Mr. Justice Black